IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 193 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HUSEN BHENU MALAD

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 193 of 1997
MR G RAMAKRISHNAN appointed by Legal Aid Committee for appellant Nos. 1-5
MR BD DESAI APP for Respondent No. 1
MR ASIM J PANDYA for Respondent No. 2

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 26/02/2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. This appeal which is filed under Section 374 (2) of the Code of Criminal Procedure, 1973 ('the Code' for short) read with Section 36-B of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) through jail, is directed against a judgment and order dated February 4, 1997 rendered by Special Judge, Kachchh at Bhuj, in Special Case No. 122 of 1994 by which appellants/original accused Nos.1 to 5 ('the accused' for short) have been convicted of the offences under Section 20 (b) (ii) read with Section 29 of the NDPS Act and sentenced to undergo R.I. for 15 years and fine of Rs.1 lakh, i.d., S.I. for two years whereas A-1 and A-4 have also been convicted of the offences punishable under Section 23 read with Section 29 of the NDPS Act and sentenced to undergo R.I. for 15 years and fine of Rs. 1 lakh i.d., S.I. for two years. It is also ordered by the learned Special Judge that both the sentences awarded to A-1 and A-4 to run concurrently and all the five accused are given the benefit of set-off.

2. Facts of the case have been detailed in the judgment of the learned Special Judge and, therefore, it is not expedient to repeat the same all over again in verbatim and in detail in this judgment. However, the basic facts which are necessary to be discussed in this appeal are that:

2.1. One Yashwantsinh Rupsinh (P.W.1), Officer Commanding, BSF Water Wing, in company of Narpatram, S.I., A.K. Devnath, Head Constable, Engine Driver Mandal, Arjun Singh and other officers, on 20.7.1994, while patrolling creek area of Koteshwar, at about 4.30 P.M., saw a wooden boat having engine, in a suspicious condition. When the boat of B.S.F. was seen by the persons fishing in the wooden boat, they tried to run away with their boat. However, since the BSF personnel had a high-speed boat they reached at the wooden boat within 5/6 minutes. The said wooden boat was stopped at the creek by the BSF officers and the persons who were found in the boat were directed to be alighted from it. In the said boat there were five persons. Upon preliminary inquiry they stated that they were Pakistani citizens and they were doing fishing illegally in the water of Indian territory. In the meanwhile, because of low tide, water level receded and the wooden boat in which they were fishing was kept stationary there. A night halt was done there near the creek and all of them were placed under the surveillance of the guards.

2.2. On the next day, i.e., 21.7.1994, P.W.1 and other

BSF officers reached Koteshwar Jetty around 9 A.M. and alighted there from the boat alongwith them. During the inquiry made by P.W.1 with them, he informed them that if they give information regarding smuggling or some illegal activities which may be known to them, they would be released. Thereupon they told that if they were to be released they would show something to the BSF personnel. Thereupon, Husen Malad, A-1 was taken in the BSF Boat with PW 1 and they went in creek area. As per information given by A-1 the boat was taken to Vaniya Vadi creek area where he showed Charas secreted in mud which was recovered. Thereafter around 5 P.M. PW -1 and other BSF officers came back to BSF Camp at Koteshwar with charas. In the BSF camp P.W.1 instructed his subordinate Inspector Tulshasing to inform the fact of recovery of Charas to the Inspector of Customs. Accordingly, this fact was informed to the Customs Department and pursuant thereto Sanjay Baviskar, Customs Inspector and N.C. Bildani, Customs Superintendent came alongwith panch witnesses. Muddamal Charas was thereafter seized after following due procedure and after making panchnama in presence of Panchas. During the aforesaid procedure, police from Narayan Sarovar Police Station reached there and they were handed over to Narayan Sarovar police on 21.7.1994 itself.

2.3. Initially, during the pendency of investigation into this case, complaint for violation of provisions of the Foreigners Act, 1946 and the Indian Passport Regulations Act was filed against the accused. Thereafter Customs Officer made an application on 6.8.1994 before learned Chief Judicial Magistrate, Kachchh at Bhuj for custody of the accused for the purpose of inquiry which was granted. Pursuant to the order passed by the learned Chief Judicial Magistrate, Kachchh at Bhuj, the Customs Department was given the custody of the accused on 7.8.1994. Statements of the accused under Section 108 of the Customs Act and under Section 67 of the NDPS Act were recorded on the same day. Second statement of A-1 was recorded on 8.8.1994 and his third statement was recorded on 9.8.1994. Second statement of A-2 was recorded on 9.8.1994. No further statement of other accused was recorded.

2.4. On 8.8.1994 formal arrest of the accused was made for violation of the provisions of the NDPS Act by the Customs Department and arrest report was submitted to the Assistant Commissioner of Customs on 8.8.1994 itself. During the investigation, report of Forensic Science Laboratory ('FSL' or short) on the sample which was collected in presence of panchas and sent for analysis

was received which revealed that the contraband article was Charas. On the basis of the statements of the accused recorded under Section 67 of the NDPS Act and Section 108 of the Customs Act it was divulged that all the accused have committed offence under the provisions of the NDPS Act and, therefore, a written complaint for the offences punishable under Sections 20, 23 and 30 of the NDPS Act came to be filed by K.S. Joshi, the then Superintendent of Customs, Kachchh at Bhuj on behalf of the Union of India, in the Court of Special Judge (Sessions Judge), Kachchh at Bhuj which was registered as Special Case No. 122 of 1994. Alongwith the complaint, list of documents like Panchnama, seizure report under Section 57 of the NDPS Act, statements recorded under Section 67 of the NDPS Act and Section 108 of the Customs Act, arrest report, inventory report and FSL report, was also produced.

2.5. The learned Special Judge, on the basis of the averments and allegations made in the complaint, framed charge against all the accused at Ex.9 for commission of the offences punishable under Sections 20 (b) (ii), 23, 29 and 30 of the NDPS Act. The charge was read over and explained to the accused. The accused pleaded not guilty to the charges levelled against them and claimed to be tried.

2.6. In order to bring home the charge framed against the accused, prosecution has examined following witnesses and relied upon their oral testimonies:

P.W.1 - Yashwantsinh Rupsinh - Officer Commanding, BSF, Water Wing, Bhuj- Ex.21.
P.W.2 - Sava Vela Maheshwari - Ex.25.
P.W.3 - Mulji Khimji Joshi - Panch No.2 - Ex. 27.
P.W.4 - Narendra Chandumal, Superintendent of Customs, Kandla - Ex. 28.

2.7. Prosecution also placed reliance on the following documents to prove the culpability of the accused:

Sr. No.	Particulars of documents	Ex. No.
1.	Copy of letter F.No.Elops/Seizure/KOT/ 94 dated 21.7.1994 of 141 BN BSF addressed to the Customs Officer, Narayan Sarovar, Kutch.	29
2.	Original seizure panchnama prepared	

in presence of panch witness Sava Vela Maheshwari and Mulji Khimji Maheshwari before N.C. Bildani, Superintendent of Customs. 30

3. Copy of letter F.No.VII/10-1/KOT/ 94/702 of Inspector of Customs, Koteshwar addressed to Incharge Police Station, Narayan Sarovar dated 22.7.1994. 31

4. Original report of seizure u/s. 57 of NDPS Act submitted by N.C. Bildani, Superintendent of Customs, Gadhuli to the Assistant Collector of Customs, Bhuj dated 22.7.1994. 32

5. Copy of letter F.No.LIB/BA/2665/94 of DSP, Bhuj addressed to the Assistant Collector, Customs, Bhuj dated 6.8.1994. 35

6. Copy of application in the Court of CJM, Bhuj (K) bearing F.No.VIII/17-8/ LEGAL/94 for the transfer of custody of five Pak nationals, dated 6.8.1994. 36

7. Copy of letter F.No. VIII/17-8/LEGAL/ 94 addressed to Superintendent of Sub Jail, Nakhatrana of Superintendent of Customs, Bhuj dated 6.8.1994 37

8. Original statement of Husen Bhenu Malad recorded by N.C. Bildani, Superintendent of Customs, Gadhuli under Section 108 of the Customs Act and under section 67 of NDPS Act dated 7.8.1994. 38

9. Original statement of Siddique Umar Malad recorded by N.C. Bildani, Superintendent of Customs, Gadhuli under Section 67 of the NDPS Act and 108 of the Customs Act dated 7.8.1994. 39

10. Original statement of Aechar Umar Malad recorded by N.C. Bildani, Superintendent of Customs, Gadhuli under Section 67 of NDPS Act and 108 of the Customs Act dated

7.8.1994. 40

11. Original statement of Khemu Alaya Malad recorded by N.C. Bildani, Superintendent of Customs, Gadhuli under Section 67 of NDPS Act and 108 of the Customs Act dated 7.8.1994. 42

12. Original statement of Hanif Ishaque Malad recorded by N.C. Bildani, Superintendent of Customs, Gadhuli under Section 67 of NDPS Act and 108 of Customs Act dated 7.8.1994. 41

13. Original further statement of Husen Bhenu Malad recorded by N.C. Bildani, Superintendent of Customs, Gadhuli under Section 67 of NDPS Act and 108 of Customs Act dated 8.8.1994. 43

14. Original further statement of Husen Bhenu Malad recorded by N.C. Bildani, Superintendent of Customs, Gadhuli under Section 67 of NDPS Act and 108 of Customs Act dated 9.8.1994. 44

15. Original further statement of Siddique Umar Malad recorded by N.C. Bildani, Superintendent of Customs, Gadhuli under Section 67 of NDPS Act and 108 of Customs Act dated 9.8.1994. 45

16. Report of arrest under Section 57 of NDPS Act to the Assistant Collector, Customs, Bhuj by A.R.Chavda, Inspector of Customs, Gadhuli dated 8.8.1994. 46

17. Copy of NCB 1 (Test Report) sent to FSL, Ahmedabad for testing dated 22.7.1994, alongwith the forwarding letter and its dated receipt 33

18. Inventory in original in respect of seized charas prepared before Executive Magistrate, Bhuj as per the provisions of NDPS Act dated

12.9.1994. 47

19. Original test report received from FSL, Ahmedabad alongwith letter addressed to the Superintendent of Customs, RCP, Gadhuli dated 4.10.94. 34

2.8. After recording of the evidence of the prosecution witnesses was over, the learned Judge explained to the accused the circumstances appearing against them in the depositions of the witnesses. Thereafter further statements of the accused were recorded under Section 313 of the Code. In further statement also they denied the prosecution case in toto and reiterated that they are innocent, they have not committed any offence, they are Pakistani citizens doing fishing and without interrogation after beating them their signatures were obtained on blank papers and they have been falsely entrapped in the alleged commission of offences under the NDPS Act. They did not lead any evidence in defence nor they examined themselves on oath.

2.9. On appreciation, evaluation and analysis of the evidence adduced by the prosecution, the learned Judge held that the prosecution has proved beyond doubt that all the accused who are Pakistani citizens have illegally under the guise of fishing entered into the water of Indian Territory, near Savla Pir, as per the information supplied by A-1 about Charas, large quantity of Charas weighing 265 Kgs. valued at Rs.1.28 crores was taken out from the place shown by him, and therefore, all the accused were connected with the said illegal trafficking of Charas by aiding each other and thereby they have committed offences under Section 20 (b) (ii) read with Section 29 of the NDPS Act whereas A-1 and A-4 have also committed offences under Section 23 read with Section 29 of the NDPS Act and resultantly the learned Judge has convicted and sentenced the accused to which reference is made in earlier paragraphs of this judgment, which has given rise to the present appeal.

3. Mr. G. Ramakrishnan, learned advocate who is appointed by Legal Aid Committee to render assistance to the accused, contended that the prosecution has not been able to establish the involvement and indulgence of the accused in the alleged offence beyond reasonable doubt and the learned Judge has also committed grave error in outrightly believing the so-called evidence of the prosecution which was not tenable in the eye of law. It is emphasised by him that when it is undoubtedly the fact to reckon with that the mandatory as well as directory

provisions of law have all been flouted with, no credence can be given to such evidence laid therein by the prosecution as also to the findings of the learned Judge. It is also emphasized by him that there has been clear flouting of the mandatory provisions as well as directory provisions contained under Sections 42 (1) and (2), 55 and 57 of the NDPS Act which in the resultant would render the conviction unsustainable. What is asserted by him is that various provisions of the Code, though directory in nature, have not been complied with and noncompliance of the same would invite adverse inference against the prosecution case. It is also highlighted by him that even several provisions contained in the Constitution of India as well as in Customs Act have not been complied with. According to him, it, therefore, goes to show that means of justice have been taken for granted.

4. In support of the aforesaid contention, Mr. G. Ramakrishnan, learned advocate for the accused, elaborately highlighted certain aspects which, according to him, are serious infirmities to the prosecution case which can be catalogued as under:

(i) The complaint is a delayed one as there was delay of 4 months and 10 days in filing it, which has not been explained.

(ii) The complainant has not been examined before the trial court.

(iii) The nature of involvement of the accused with the contraband article is not spelt out in clear terms in the complaint.

(iv) The investigating officer is also the complainant and hence the said complaint and trial thereto are not maintainable.

(v) The complaint otherwise could have been filed by the BSF personnel who are also empowered with extended powers of the Police under the Code as also envisaged under the BSF Law Manual. Therefore, there was no requirement to involve the Superintendent of Customs and the said Department.

(vi) The alleged offence is pertaining to one under the NDPS Act and not the one for evasion of Customs Duty which ought to be under the Customs Act, 1962.

(vii) The complainant is only a hearsay witness to the alleged incident.

(viii) The complainant has not followed the mandatory provisions of the NDPS Act.

(ix) The entire complaint failed to establish even prima facie the aspect of conscious possession of the accused with the contraband article.

(x) Mere knowledge about the contraband article does not establish the fact of guilt of conscious possession.

(xi) P.W.1 was not present at the place of incident or during the interrogation of the accused.

(xii) So-called information supplied by A-1 ought to have been reduced into writing by BSF personnel as Section 42 of the NDPS Act is applicable and on the facts of the case Section 43 cannot be made applicable.

(xiii) BSF personnel have no right to entrust the muddamal to the Customs Department.

(xiv) Doubt is raised about the authenticity of the sample taken from the contraband article whether it is the same substance which was sent to FSL for analysis from the original contraband article Charas.

(xv) Panch witnesses have turned hostile and it has not come on record who has weighed the muddamal while sample was taken for sending to FSL. According to Panch witnesses presence of the accused at the time of drawing sample and preparing Panchnama is not established.

(xvi) Statements of the accused recorded under Section 108 of the Customs Act and Section 67 of the NDPS Act are hit by Article 20 (3) of the Constitution of India as they were in judicial custody.

(xvii) P.W.4 is a hearsay witness who ought not have gone to the creek at Vaniya Vadi nor he was present at the time of seizure or preparing panchnama and drawing sample.

5. Pointing out the aforesaid infirmities which,

according to the learned advocate, are serious in nature and fatal to the prosecution case, it is contended that the accused are innocent and not in any way involved in the alleged incident and there was noncompliance of various provisions of the NDPS Act and, therefore, serious doubt is raised on the prosecution case and the so-called statements recorded under Section 67 of the NDPS Act and Section 108 of the Customs Act during the arrest and at the time of their being in judicial custody, would not be sufficient as conclusive piece of evidence to sustain conviction as there has also to be other corroborative and independent piece of evidence to establish the authenticity and credibility of those so-called confessional statements and hence the entire prosecution case fails as there is no substratum in the prosecution case and thus the order of conviction and sentence passed by the trial court against the accused deserves to be quashed and set aside by allowing this appeal. He, therefore, urged to allow this appeal and thereby to acquit the accused.

6. To buttress the aforesaid submission, the learned advocate also relied upon following decisions of the Supreme Court:

(i) Revatram Ratanchand Thakur v. State of Goa, III (1995) CCR 217 (DB) Bombay High Court, 217.

(ii) Koluttumottil Razak v. State of Kerala, 2000 SCC (Cri) 829.

(iii) Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513.

(iv) State of Punjab v. Balbir Singh, (1994) 3 SCC 299.

(v) Roy V.D. v. State of Kerala, (2000) 8 SCC 590.

7. In answer to these submissions, Mr. Asim Pandya, learned counsel who appears on behalf of the Union of India, has supported the impugned judgment and order throughout. According to him, no infirmity is found in the judgment and order rendered by the learned trial Judge as he has given cogent reasons for coming to the conclusion that the accused are guilty of the offences with which they are charged. It is also asserted by him that the prosecution has proved beyond doubt the involvement and indulgence of the accused in the alleged offences as large quantity of contraband article - Charas was recovered at their instance. What is asserted by him

is that there is a positive evidence that all the accused have illegally entered into the water of Indian territory for the purpose of illegal trafficking of the contraband article - Charas which they were to export from the Indian territory to Pakistan territory, which was concealed in Indian territory. Not only that in past also they exported 225 Kgs., of Charas from the same place but on that particular day, i.e., 20.7.1994 they came to the water of Indian territory to export Charas from Vaniya Vadi creek to Pakistan. Therefore they had knowledge about the contraband article and since they were to lift the said contraband article it is proved that they were in conscious possession of the same. It is also emphasised by him that the prosecution evidence is consistent in this regard. Panchnama was prepared in the presence of Panchas. They have supported the procedure carried out by the Customs Department while taking sample which was sent to FSL for analysis. It is true that the Panchas have not supported the prosecution case so far as presence of accused is concerned. However, on this ground the entire evidence of the panchas cannot be treated as effaced or washed off the record altogether as part of their evidence which is otherwise acceptable can be acted upon. It is also stressed by the learned counsel that all the accused are consistent in their statement recorded under Section 108 of the Customs Act and Section 67 of the NDPS Act and they have given detailed background of their families which otherwise would have been impossible if they have not voluntarily given their statement. It is emphasised by the learned counsel that while the statement of the accused was recorded they were not in police custody but were in judicial custody in connection with the offences for violation of the provisions of the Foreigners Act and Indian Passport Regulations Act. At that time neither complaint was lodged against the accused in connection with the offences under the NDPS Act, nor they were arrested in connection therewith, therefore, much credence can be given to the said statement as the same got corroboration from other independent witnesses like P.W.1, P.W.4 as well as panch witnesses P.W.2 and P.W.3. While criticizing the submission made by the learned advocate for the accused with regard to the so-called infirmities it is contended by the learned counsel for the Union of India that those infirmities which have been pointed out by the learned advocate for the accused cannot be termed as infirmities. Besides this it is also pointed out that the statutory and mandatory requirements of the provisions of the NDPS Act have been fully complied with. Lastly it is contended that the accused had never retracted their statements at any point of time

inspite of the fact that several opportunities were given to them to retract from it. A-1 has only for the first time stated in his further statement that his statement was recorded under compulsion, duress by beating him and it was not voluntarily made by him.

8. On the aforesaid premises, the learned counsel for respondent No.2 submitted that there is no infirmity in the impugned judgment and order. The learned trial Judge has also considered all the aspects and reached to the correct conclusion as on the facts and in the circumstances of the case no other conclusion was possible except the one reached by the learned trial Judge in connection with the guilt of the accused. In this view of the matter, the appeal lacks merit and deserves to be dismissed. He, therefore, urged to dismiss the appeal and thereby to confirm the impugned judgment and order of conviction and sentence of the accused passed by the learned trial Judge.

9. To buttress the aforesaid submissions, learned counsel has relied upon following authorities:

(i) Sayar Puri v. State of Rajasthan, (1998) 7 SCC 441.

(ii) Aslambhai Ibrahimbhai Memon and another v. The State of Gujarat, 1990 Cri.LJ 1787.

(iii) Ravishankar Bhagwatiprasad Mishra v. State of Gujarat, 2000 (1) GLR 137.

(iv) Raghubhai Gandabhai Bharwad v. State, judgment dated 5/6-2-2002 delivered by this Court (Coram: J.M. Panchal & JR. Vora, JJ.) in Criminal Appeal No.12 of 2002.

(v) Ramji Duda Makwana v. The State of Maharashtra, 1994 Cri.LJ 1987.

(vi) K.C. Jaya Kumar v. The State, 1997 Cri.LJ 10.

(vii) Utpal Mishra, Air Customs Officer, IGI Airport v. Nicelai Christensen, 1997 (4) Crimes 108.

(viii) Satyanarayan Das v. State of Orissa, 1999 Cri.LJ 974.

(ix) Karnail Singh v. State of Rajasthan, 2000 Cri.LJ 4635.

(x) K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin, (1997) 3 SCC 721.

(xi) Bipinbhai A. Patel v. State of Gujarat, 1998 (1) GLR 589.

(xii) Gulam Hussain Shaikh Chougule v. S. Reynolds, Superintendent of Customs, Marmgoa, AIR 2001 SC 2930.

(xiii) Sumarkhan Sidiqkhan Sindhi v. Collector of Customs (Preventive), 1999 (1) GLR 863.

(xiv) Bhana Khalpabhai Patel v. Assistant Collector of Customs, Bulsar and another, 1998 (2) GLR 1319.

10. Mr. B.D. Desai, learned APP who appears on behalf of respondent No.1 - State of Gujarat has supported the impugned judgment and order recorded by the learned trial Judge and has adopted all the submissions advanced by Mr. Asim Pandya, learned counsel for respondent No.2 - Union of India and urged that the appeal may be dismissed by confirming the impugned judgment and order of conviction and sentence recorded by the trial court.

11. We have considered the submissions advanced at the bar by the learned advocates appearing for the parties and reappreciated, reevaluated and reanalysed the whole evidence on record. We have gone through the entire record of the case. We have also considered the judgments cited at the bar by them.

12. Before dealing with the contentions advanced by the learned advocates appearing for the parties, it would be profitable to refer to the salient aspects emerging from the oral testimony of the prosecution witnesses, in brief, which would throw abundant light on the prosecution case.

13. P.W.1 - Yashwantsinh Rupsinh, Officer Commanding, BSF Water Wing, testified at Ex.21, has stated that he and other BSF Officers spotted the accused on 20.7.1994 while fishing in the Water of Indian Territory in a suspicious condition. He stopped the boat of the accused and asked them preliminary questions. On 21.7.1994 he took A-1 Husen Malad to Vaniya Vadi Creek and Charas was recovered from the place shown by him. He confirmed the presence of Custom Inspector Baviskar and Superintendent of Customs N.C. Bildani. He instructed Tulshasing to

inform Narayan Sarovar Police Station about the recovery of Charas. Ex.29 which is claimed to be the seizure memo was prepared as per the instructions given by Company Commander. When the accused were handed over to Customs Department and at the time of preparing Panchnama he was present.

14. Now adverting to the evidence of P.W.4, Superintendent of Customs, N.C. Bildani recorded at Ex.28 it is seen that on 21.7.1994 at about 5.30 P.M. a person from BSF Camp came to give a message regarding recovery of Charas by BSF. He was informed by Tulshasing that BSF personnel took A-1 to the spot where Charas was secreted and came back with Charas. On sample covers he put his signature. He also identified his signature on Muddamal cover. Panchnama and seizure procedure was carried out in his presence and he submitted seizure report on 22.7.1994 to Assistant Commissioner of Customs, Bhuj. On 24.7.1994 he wrote a letter to FSL, Ahmedabad and the said letter as well as sample were taken to Ahmedabad by himself. On 6.8.1994 he received letter from D.S.P., Kachchh at Bhuj in which it was stated that Customs Department should take the custody of the accused from Nakhatrana Jail. On 7.8.1994 custody of the accused was obtained and thereafter statements of accused were recorded under section 67 of the NDPS Act and 108 of the Customs Act. He put his signature beneath the same. On 8.8.1994 he prepared arrest memo and thereafter the accused were produced before the learned Chief Judicial Magistrate and remand was sought. Thereafter further statement of A-1 and A-2 was recorded on 8.8.1994 and 9.8.1994 respectively. On 12.9.1994 he informed the Executive Magistrate, Bhuj about the Charas. The Executive Magistrate came and inventory of the recovered Muddamal was made. The inventory contained hand writing of the Executive Magistrate and himself. Thereafter he was transferred and in his place one Joshi who took charge filed complaint on the basis of the inquiry papers. In cross-examination he unequivocally stated that he had explained the accused about the provisions of Section 108 of the Customs Act and Section 67 of the NDPS Act before recording their statements. It may be appreciated that nothing substantial has been brought out by the defence during cross-examination of P.W.1 and P.W.4 which is capable of raising a doubt on their oral testimony, their presence and the procedure which they have undertaken. According to us, both P.W.1 and P.W.4 withstood the test of cross-examination.

15. Now coming to the evidence of P.W.2 -Sava Vela Maheshwari, Ex.25 (Panch witness No.1) and P.W.3 Mulji

Khimji Joshi Ex.27 (Panch witness No.2), it is gathered that P.W.3 has completely supported the prosecution case except stating that at the time of preparation of Panchnama he did not see the accused. Otherwise his examination-in-chief and cross-examination unequivocally suggested that he was present while panchnama was being prepared. He also specifically stated that Yashwantsinh BSF Officer was present in the BSF Camp. Panchnama was prepared in his presence. He specifically denied the suggestion put forward by the advocate for the accused that their signatures were obtained on 22.7.1994 i.e., on the next day. He also admitted his signature on all the pages of the Panchnama and the covers in which samples were drawn by the Customs Department for sending them to FSL. It may be noted that P.W.2, Save Vela Maheshwari, is not very consistent and he denied the presence of the accused at the time of preparing Panchnama. However, he admitted that he had signed the covers containing muddamal as well as the Panchnama. He also stated that Panchnama was read over to him and only thereafter he had put his signature. He confirmed that another Panch was also present.

16. In view of the aforesaid evidence of Panch Witnesses there is no manner of doubt that they have supported the prosecution case so far as preparation of Panchnama, taking sample and sealing the same in their presence and their signatures on the Panchnama as well as the covers in which samples were drawn by the Customs Department for sending them to FSL for analysis. They have not supported the prosecution case so far as the presence of the accused at the relevant time is concerned.

17. In the aforesaid backdrop of the prosecution evidence, now let us examine the contentions advanced by Mr.G. Ramakrishnan, learned advocate for the accused and replied by Mr. Asim Pandya, learned counsel for respondent No.2 - Union of India.

18. According to Mr. G. Ramakrishnan, learned advocate for the accused, since A-1 gave prior information regarding Charas which was secreted in Vaniya Vadi Creek, the information ought to have been reduced into writing and procedure contemplated under Section 42 of the NDPS Act should have been complied with but since the said procedure is not complied with, the trial is vitiated and hence conviction and sentence should be set aside.

18.1. According to us, this contention is without any

merit and substance as in the present case provisions of Section 42 of the NDPS Act are not at all attracted. Section 42 of the NDPS Act applies to the case where search or seizure is to be carried out in respect of contraband goods kept or concealed in any building, conveyance or enclosed place. In the present case, the contraband article - Charas was not concealed or kept in any building, conveyance or enclosed place but it was recovered from the mud in the Creek area which is a public place within the meaning of Section 43 of the NDPS Act. The explanation of Section 43 of the NDPS Act provides inclusive definition of the term "public place". The explanation reads as under:-

"Explanation:- For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

There is no manner of doubt that Creek area is a place used by and accessible to public and the said area is also used for fishing by Indian fishermen and hence it squarely falls within the aforesaid term "public place".

18.2. In Sayar Puri's case (supra), the Supreme Court held that evidence showed that the accused was found to be in possession of opium while sitting on a bench on a particular public road and in such circumstances, procedure under section 42 (2) of the NDPS Act was not required to be followed.

18.3. In Aslambhai's case (supra) a Division Bench of this Court held that whenever any search or seizure is to be made in any public place or in a vehicle in transit or any person is to be arrested or detained from a public place, it is not intended by the Legislature to take down the said information in writing. It is further held that it is important to know that wordings of Sections 41 and 42 of the NDPS Act with regard to information taken in writing have been deliberately omitted by the legislature in Section 43 and that has been done advisedly inasmuch as the police officer may get information about the person in public place at the last moment and if he has to undergo the procedure of taking it in writing and recording the reasons for his belief, possibly such information may not be useful.

18.4. In Ravishankar's case (supra) a Division Bench of this Court had an occasion to consider the question whether the provisions of Sections 41 (2) and 42 (2) of the NDPS Act should be complied with when search and

seizure of a person sitting on otta portion of a building is made. In the said case, the appellant who was sitting on otta portion of a building, was searched. The contention which was raised before the Division Bench was that the provisions of Sections 41 (2) and 42 (2) of the NDPS Act were not complied with and, therefore, the conviction of the appellant was illegal. The Division Bench after interpreting the provisions of Sections 41 (2) and 42 (2) of the NDPS Act held that those provisions would not be applicable inasmuch as it was not a case where a building or a conveyance or a private place was required to be searched. The ratio laid down by the Division Bench of this Court in that case is squarely applicable to the present case and, therefore, it was not required for the officers to comply with the mandatory provisions of Sections 41 (2) and 42 (2) of the NDPS Act as search and seizure were made at a public place.

18.5. Similar question arose before a Division Bench of this Court (Coram: J.M. Panchal & J.R. Vora, JJ.) in Raghubhai's case (supra), in Criminal Appeal No.12 of 2002 which was decided on 5/6-2-2002. The Division Bench aptly considered this question and replied in paragraphs 10.3 and 10.4 of the said judgment by referring to Sayar Puri's case (supra) and Aslambhai's case (supra) and held that provisions of Section 42 of the NDPS Act would not be applicable where search or seizure is made at any public place or in a vehicle in transit or any person is to be arrested or detained from any public place.

18.6. Applying the principles laid down by the Supreme Court as well as this Court in the above referred to four judgments to the facts of the present case and more particularly in view of the evidence which we have adverted in earlier paragraphs of this judgment, there cannot be any dispute that contraband article Charas was recovered from a "public place". It hardly needs to be emphasized that "public Place" described under Section 43 of the NDPS Act is inclusive and it is settled principle of law that when there is inclusive definition of any term given in a statute, that term would not only embrace within its sweep the things embodied in the definition but also other things. In substance, when inclusive definition is given, it should be construed in the widest possible sense and the restricted meaning of the term should be avoided.

18.7. In aforesaid view of the matter, we are of the considered opinion that the contraband article Charas was recovered from a public place as per the explanation given in Section 43 of the NDPS Act and, therefore,

compliance of provisions of Section 42 are not at all required and hence the first contention raised by Mr. G. Ramakrishnan, learned advocate for the accused lacks merit and it is accordingly rejected.

19. The second contention advanced by Mr. G. Ramakrishnan, learned advocate for the accused, is that presence of P.W.1 has not been established by the prosecution and, therefore, no credence can be given to his oral testimony.

19.1. This contention, according to us, appears to be absolutely feeble as it is without any basis. From the evidence of P.W.3 (Panch witness) and P.W.4 (Officer of Customs Department) presence of P.W.1 is established. It may be noted that so far as the oral testimony of the witnesses are concerned, they are consistent in saying that at the relevant time they all were together. Therefore, this contention is required to be rejected and accordingly it is rejected.

20. The third contention canvassed by learned advocate for the accused is that information regarding recovery of Charas should have been given to the nearest police station and complaint ought to have been given to the police or Magistrate immediately. It is also canvassed by him that BSF has no power to entrust the muddamal to Customs Department and, therefore, adverse inference should be drawn against the prosecution. It is contended that Muddamal should have been handed over to the concerned police officer for safe custody under Section 55 of the NDPS Act as the Customs Department is not entitled to keep the muddamal with them.

20.1. According to us, the aforesaid contention raised by Mr. G. Ramakrishnan, learned advocate for the accused, is contrary to the provisions of NDPS Act. Under the provisions of Sections 36-A and 42 read with sections 67 and 53 of the NDPS Act, the Central Government has issued Standing Order Nos. 822 (E), Standing Order No. 823 (E) and Standing Order No. 763 (E) empowering the officers of Customs, Central Excise, D.R.I. etc., to carry out search, seizure, to file complaint and to exercise same powers of "officer in-charge of police station" as available under the Code. In view of this, BSF is entitled to give information regarding recovery of Charas to any of the empowered agencies and the requirement of law is not that the said information should be given to the State Police only. It is relevant to note that from the facts disclosed by the accused in their statements recorded under Section 67 of

the NDPS Act and under Section 108 of the Customs Act, it is very clear that the muddamal Charas was imported into Indian Territory from Pakistan without any valid licence or permit. It is also disclosed in their statements that on one occasion a part of Charas brought into Indian Territory from Pakistan was exported (transported) by the accused to Pakistan illegally. Thus, essentially the case was pertaining to illegal export and import. In such a circumstance, the Customs Department is the only appropriate Department to whom the information should be given and BSF has rightly done so in informing the Customs Department and handing over the muddamal to Customs Department. The Customs Officers are entitled to keep the seized goods in safe custody at their own godown or head quarters and there is no illegality in handing over and retaining the said goods by the Customs Department. Thus the contention that the muddamal article should have been kept by the police in safe custody under Section 55 of the NDPS Act is without any merit and hence the said contention is also rejected.

20.2. In Ramji Duda's case (supra), a Division Bench of the Bombay High Court held that if raid conducted by specialized authority such as Narcotics Control Bureau, Customs, Central Excise, etc. they are not precluded from retaining contraband in safe custody at their own headquarters.

20.3. In K.C. Jaya Kumar's case (supra) similar question arose before a Single Judge of the Andhra Pradesh High Court. In the said case the boxes containing psychotropic substances seized were not deposited in any police station. The learned Single Judge held that there was no question of affixing of seal of officer in-charge of police station as provisions of Section 53 of the NDPS Act and not Section 55 of the NDPS Act are attracted.

20.4. In Utpal Mishra's case (supra), similar question arose before a Division Bench of the Delhi High Court. In the said case Customs Officer at Airport recovered Hashish. The learned Special Judge convicted the accused. The said conviction was challenged before a Division Bench of the Delhi high Court on the ground that the sample had not been kept in custody of local area of police station. The said plea was negatived by the Division Bench of the Delhi High Court holding that Custom Officer being invested with powers of an officer, incharge of police station, sample could be legally kept in the malkhana of Customs and there was no requirement in law that same should be sent to local police station.

20.5. In Satyanarayan Das's case (supra), similar question arose before learned Single Judge of the Orissa High Court. In the said case safe custody of seized articles and samples were kept in Excise Malkhana in custody of Inspector Incharge of Malkhana with personal brass seal till same were sent to chemical examination. The report of chemical examiner showed that seals were intact and identical. In the said case the learned Single Judge held that there was no infraction of Sections 52, 55 and 56 of the NDPS Act.

20.6. In Karnail Singh's case (supra) the Supreme Court held that Officer in charge of police station required to affix seal etc., under Section 55 of the NDPS Act is distinct agency than "officers" contemplated under Section 53 of the NDPS Act. The arrested person and seized articles were forwarded under Section 52 (3) (b) of the NDPS Act to officer empowers under Section 53 of the NDPS Act and hence mandate of Section 55 need not be complied with.

20.7. Applying the principles laid down by the Supreme Court and various High Courts in the judgments referred to hereinabove to the facts of the present case and in view of the various Standing Orders which we have referred to in para 20 (1) of this judgment, there is no manner of doubt that the Officers of the Customs and Central Excise and D.R.I. etc., are empowered to carry out search, seizure, to file complaint and exercise same powers of the officer incharge of a police station as available under the Code. Therefore there is no need to comply with the provisions contained in section 55 of the NDPS Act and hence the third contention advanced by Mr. G. Ramakrishnan, learned advocate for the accused is also devoid of any merit and is accordingly rejected.

21. The fourth contention put forward by the learned advocate for the accused is that there is a delay of about four months in filing complaint which is fatal to the prosecution case. It is submitted that when the complaint for violation of provisions of the Foreigners Act and the Indian Passport Regulations Act is filed immediately there was no reason for not filing complaint under the NDPS Act on that day by the police.

21.1. In our view, this contention is also without substance. In this regard it is required to be noted that no complaint could be filed under the NDPS Act unless there is prima facie material or evidence against the accused connecting them with the alleged offence

under the NDPS Act. In the instant case, inquiry regarding recovery of Charas was handed over to the Customs Department on the same day and unless the inquiry is completed by the Customs Department, it was not possible to file FIR or complaint. In completing inquiry and gathering material against the accused some time was taken and, therefore, it cannot be said that there was a delay in filing complaint. It is also relevant to note that once inquiry was undertaken by the Customs Department, there was no need to file F.I.R. for the same cause before the police. For recording statements of the accused who were in judicial custody in connection with the offences for violation of provisions of the Foreigners Act and the Indian Passport Regulations Act, some procedural formalities were to be undertaken by the Customs Department which took sometime. The application for obtaining custody of the accused was made on 6.8.1994 and the same was granted on the same day. In pursuance of the said order, the custody of the accused was in fact given on 7.8.1994. The complaint was, therefore, filed only after gathering evidence against the accused and after conclusion of the inquiry under the Customs Act. Thus, there is no substance in the contention that there was delay in filing the complaint and hence same is rejected.

22. The fifth contention which is advanced by the learned advocate for the accused is that there was total noncompliance of provisions of Section 57 of the NDPS Act as BSF Officers have neither reported the arrest nor the seizure in compliance of provisions of Section 57 of the NDPS Act.

22.1. According to us, this contention is also without any substance as the BSF officers have neither arrested the accused nor seized the contraband article - Charas. The BSF officers have simply caught the accused and thereafter immediately on the same day handed them over to the State Police to register complaint against them for violation of the provisions of the Foreigners Act and the Indian Passport Regulations Act. The BSF officers also on the same day handed over the Muddamal Charas to the Customs Department who seized the said goods under the Customs Act read with the NDPS Act. The formal arrest of the accused in connection with the NDPS Act was made by the Customs Department on 8.8.1994. The Customs Department had fully complied with the provisions of Section 57 of the NDPS Act by reporting seizure as well as the arrest. In this connection, it is appropriate to refer to Ex.32 page 194 of the paper book which is a letter dated 22.7.1994 written by the Superintendent of

Customs, Gadhuli to the Assistant Collector of Customs, Bhuj wherein the Superintendent of Customs has informed seizure of 256 Kgs. of Charas on 21.7.1994 valued at Rs.1.28 crores at Koteshwar and thus intimation to superior officer, that is, Assistant Collector of Customs, Bhuj was given. It is equally important to refer to Ex.46 at page 228 which is a letter dated 8.8.1994 written by the Superintendent of Customs, Gadhuli to the Assistant Collector of Customs, Bhuj wherein the arrest report of five accused was made to the immediate superior officer. In view of the aforesaid two documents, it cannot be said that the Customs Department has not fully complied with the provisions of Section 57 of the NDPS Act. In view of the aforesaid state of affairs, the fifth contention advanced by Mr. G. Ramakrishnan, learned advocate for the accused, is without any merit and substance and it deserves to be rejected and accordingly it is rejected.

23. The sixth contention which is canvassed by the learned advocate for the accused is that the samples which were sent to the FSL were not properly sealed as the signatures of the officers as well as Panch witnesses were not affixed at the place where covers can be opened or closed.

23.1. In this connection it is required to be noted that covers have been properly sealed and there is clear cut evidence that one seal was affixed by the Customs Department at the place from where covers can be opened. Thus there were no chances to tamper with the samples drawn by the Customs Department. Not putting the signatures at the place of opening of cover does not ipso facto lead to the conclusion that there was tampering as the seal was applied at that very place. The report of the FSL also mentions that the seals on the covers were found to be in tact and, therefore, no inference of tampering can be drawn when prima facie the prosecution has established that the samples were sealed properly. Thus when the prosecution has discharged its burden of proof by showing that covers were properly sealed, it is for the accused to prove otherwise if they allege tampering with the samples. In this case there is no such allegation of tampering with the samples and no evidence was led by the accused to show that there was in fact tampering with the samples. Thus this contention is also without any merit and substance and hence deserves to be rejected and accordingly it is rejected.

24. The seventh contention raised by Mr. G. Ramakrishnan, learned advocate for the accused, is that

this is a case where the accused have only knowledge of the muddamal Charas secreted at a particular place and they were not found to be in possession of the said article and it is settled principle of law that mere knowledge of the contraband article does not establish the guilt of conscious possession.

24.1. In this connection, it would be appropriate to refer to the statements of the accused recorded under Section 67 of the NDPS Act and Section 108 of the Customs Act. It is very clear from the statements of all the accused that they had knowledge of the Charas concealed in the creek area and they entered into the Water of Indian territory with a specific intention to illegally transport the Charas back to Pakistan. Their statements also reveal the fact that on an earlier occasion prior to about 3/4 months of the present incident, the accused had in fact transported about 225 Kgs. of Charas back to Pakistan in their boat and thereby violated the provisions of the NDPS Act. Thus this is not merely a case of knowledge but it is a case where in fact the accused have committed an offence earlier and in the second attempt they were caught before the illegal transportation took place.

24.2. The reported decision of a Division Bench of the Bombay High Court in Revatram's case (supra) relied upon by Mr. G. Ramakrishnan, learned advocate for the accused, is of no avail or assistance to the accused as it is not applicable to the facts of the present case. In the said case, the Division Bench of the Bombay High Court held that the manner in which the recovery was recorded, the exclusion of the owner of the building from the guilt, non-examination of photographer by the prosecution, doubt cast by the witness in identifying the accused, etc., all will go to show that recoveries in the Flower Scene Restaurant have not been proved, but cast doubt in the guilt of the accused. On the aforesaid factual situation of that case it was further held that in order to fasten liability under Section 20 (b) (ii) of the NDPS Act possession of the contraband article Charas has to be proved positively and mere knowledge of the person or the place where the Charas could be found cannot be equated with the possession in order to come under the ambit of Section 20 (b) (ii) of the NDPS Act.

24.3. The above referred to decision of the Division Bench of the Bombay High Court rested on the facts of that case. In the instant case, there is ample evidence to establish that the accused have illegally entered into the water of Indian territory with a specific purpose and

intention to take back the Charas concealed in the creek area of Vaniya Vadi and in past also they had successfully illegally imported about 225 Kgs. of Charas from the said lot to Pakistan and they again came to take back the remaining stock of Charas and, therefore, according to us conscious possession of the accused is established. In this case, it is not that merely the accused had the knowledge but knowledge together with the conscious possession is established and, therefore, this contention also, according to us, does not have any force and deserves to be rejected and accordingly it is rejected.

25. The eighth and the last contention which vociferously canvassed by Mr. G. Ramakrishnan, learned advocate for the accused, is that the statements of the accused recorded under Section 67 of the NDPS Act and Section 108 of the Customs Act cannot be relied upon to hold them guilty and cannot be made basis for their conviction for the alleged offences.

25.1. In this regard, it is required to be borne in mind the nature and tenor of the statements of all the accused. The statements of all the accused, for the first time, were recorded on 7.8.1994. In their statements all of them have given minute details of their family background. All the accused have also narrated the previous incident of illegal transportation of charas to Pakistan by them and the amount paid to A-1 and other persons. In their statements the accused have given details as to how the consignment of charas was unloaded into the water of Indian territory by Jat Gang of Pakistan and how they came to know about unloading of charas. In their statements they disclosed name of Major Mohmedkhan Pathan of Pakistan Army and how Major Mohmedkhan Pathan and his four colleagues and Omar Malik with the army jeep took the delivery of Charas from A-1. Their statements also disclosed the fact that A-1 was arrested by Chuhad Jamali Police Station for bringing the charas to Pakistan illegally. Their statements also disclosed the fact that Major Mohmedkhan Pathan got A-1 released from police by exercising his influence. Their statements also gave details as to how A-1 came in contact with Major Mohmedkhan Pathan. Their statements also corroborated the fact that the present consignment of charas was brought to BSF, Koteshwar Camp and there the Charas was weighed in presence of BSF Officers and Officers of the Customs Department. A-3, A-4 and A-5 have also stated that seizure had taken place in their presence. The panchnama was also prepared in their presence and the officers of the BSF and Customs

Department put their signatures in their presence on the Panchnama and samples. Further statements of A-1 and A-2 were recorded by the Customs Department. The second statement of A-1 was recorded on 8.8.1994 and his third statement was recorded on 9.8.1994 whereas second statement of A-2 was recorded on 9.8.1994 only and there is no third statement of A-2. In second statement dated 8.8.1994, A-1 gave detailed description of Major Mohmedkhan Pathan and how be came in contact with him. He gave more details about the first illegal transportation of Charas to Pakistan from India and selling it in Pakistan. He also gave names of the police officers who arrested him in Pakistan. In his third statement dated 9.8.1994, A-1 gave description of Gulam Husen Brohi to whom he intended to sell Charas. He also specifically stated that he and A-2 had entered into the water of Indian territory with an intention to illegally transport the charas back to Pakistan from Vaniya Vadi creek.

25.2. In the second statement of A-2 dated 9.8.1994, he gave more details about the first illegal transportation of charas to Pakistan. He stated that in the water of Indian territory where they were doing fishing, many other fishing boats were also there and he knew other persons doing fishing in this area by their face.

25.3. In the statement of Aechar Umar Malad, A-3, in addition to family background and other common details, he also stated that he came in the boat "Abdul Gani" but before that he used to work with A-2 on his boat "Dillagi". He confirmed that on 20.7.1994 he was with Husen Malad A-1 and other persons and they were caught by BSF officers. He also stated that he was to get his share from the sale proceedings of charas and the responsibility of selling charas was taken by A-1.

25.4. In the statement of Hanif Ishaque Malad - A-4, in addition to his family background he stated that he had been doing fishing for the last four months and he did not have his own boat. He stated that he did fishing with A-1. He confirmed that he accompanied Husen Malad A-1 while illegally transporting 225 Kgs. of charas to Pakistan from India on the first occasion. He also confirmed the fact that Husen Malad A-1 handed over Charas to Mohmedkhan Pathan and A-1 was rewarded with Rs.1100/- and he was paid Rs.200 and a new pair of clothes.

25.5. In the statement of Khemu Alaya, A-5, he also gave common details like family background and in

addition he stated that he was unable to maintain his family by farming and that he had joined A-2 and had been doing fishing with him for the last two years. He stated that he had been to Chauhan Creek 4 to 5 times in these two years. He also confirmed his presence while charas was unloaded in the Indian territory. He gave names of other persons also who were with him on the first occasion. He confirmed that on 20.7.1994 he was there with A-2 and others in creek area and they were caught by BSF Patrolling party.

25.6. All the above statements clearly involved all the accused with commission of the offences under the NDPS Act. As their statements have not been retracted by any of them, they appear to be voluntarily made by them. The accused have also not complained before the Magistrate or Special Judge that their statements have been recorded by coercion, threat, duress, etc. Thus, in view of these facts and detailed facts given by all the accused, it is very clear that their statements are voluntarily made and they are genuine in nature. The details which have been given by the accused in their statements cannot be in any case mere imagination or concoction by the officers of the Customs Department. These statements are wholly reliable and conviction can be sustained on the basis of these statements.

25.7. In Bipinbhai's case (supra), a Division Bench of this Court upheld the order of conviction based on confessional statement made before Customs authorities. It is also held that since maker of the statement was not "person accused of offence" Article 20 (3) of the Constitution of India would not be attracted. In that case pursuant to summons issued under section 108 of the Customs Act and Section 67 of the NDPS Act inculpatory statement was made by the accused before the Customs Authorities who made formal arrest of the accused thereafter. The ratio laid down by the Division Bench of this Court in the above referred to decision is squarely applicable to the facts of the present case as in the instant case the accused were initially arrested for violation of provisions of the Foreigners Act and the Indian Passport Regulations Act and their custody was obtained under the order of the Court and thereafter statements were recorded. Therefore they were not accused of the offences under the NDPS Act at the time when their statements were recorded and, therefore, provisions of Article 20 (3) of the Constitution of India would not be attracted.

25.8. In Sumarkhan's case (supra), a Division Bench of

this Court held that confessional statement made before Superintendent, Central Excise is admissible in evidence as Officers appointed under the provisions of Section 53 of the NDPS Act are not police officers within the meaning of Section 25 of the Evidence Act. The ratio laid down in the above referred to decision is squarely applicable to the facts of the present case as in this case also when the confessional statements were recorded by the Customs Department the accused were not arrested for the offences under the NDPS Act and their custody was obtained under the orders of the learned Magistrate as the accused were arrested for violation of the provisions of the Foreigners Act and the Indian Passport Regulations Act.

25.9. In Bhana Khalpabhai's case (supra), Supreme Court held that statements recorded under Section 108 of the Customs Act by the Customs Officers are admissible in evidence.

25.10. In Gulam Hussain Shaikh's case (supra), Supreme Court held that confessional statement recorded under Section 108 of the Customs Act is not inadmissible in evidence on the ground that safeguards prescribed under Section 164 of the Code were not complied with while recording statement.

25.11. In K.I. Pavunny's case (supra), Supreme Court held that person suspected by a Customs Officer of having committed an offence under the Customs Act is not an accused at that stage. He becomes an accused only when summons are issued by a competent Court/Magistrate pursuant to a complaint lodged by the competent Customs Officer. Hence his statement recorded during an inquiry under Section 108 of the Customs Act or during confiscation proceedings is not that of an accused within the meaning of Section 24 of the Evidence Act. The ratio laid down in the above referred to judgment is also squarely applicable to the facts of the present case as in this case also accused were suspected by BSF personnel of having committed offence under the NDPS Act and, therefore, they were brought to BSF Camp at Koteshwar and during interrogation they voluntarily gave information about the Charas which they secreted in Vaniya Vadi creek and thereafter their statements were recorded before filing complaint under the provisions of the NDPS Act. Thus, it is clear that their statements recorded during the inquiry under Section 67 of the NDPS Act are not that of an accused within the meaning of Section 24 of the Evidence Act.

25.12. It cannot be laid down as an absolute rule of law that the statement of an accused recorded under Section 108 of the Customs Act and Section 67 of the NDPS Act cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. To put it differently, there is neither rule of law nor of prudence that the statement cannot be acted upon without corroboration. If the Court is satisfied that the statement is true and voluntary in nature, it can base conviction on it without corroboration. The Court has to scrutinise the statement carefully and must ensure that the statement is not the result of coercion, duress or undue influence.

25.13. In aforesaid view of the matter, the statements made by the accused persons under the provisions of Section 67 of the NDPS Act and Section 108 of the Customs Act before the Customs Officer were voluntary, without coercion, duress or undue influence as their statements were recorded when they were not in police custody and in view of the fact that their statements were never retracted by them, they can be made basis for the conviction as they are trustworthy and also found general corroboration from the other documentary evidence as well as oral testimony of the witnesses.

26. From the foregoing evidence of the prosecution witnesses, we are of the opinion that the prosecution case against the accused has been fully established. P.W.1 who caught the accused while fishing illegally in the water of Indian territory has clearly deposed before the Court regarding the incident and recovery of the contraband article - Charas at the instance of A-1. In his cross-examination nothing inconsistent was brought out by the advocate for the accused. His oral testimony is corroborated by oral testimony of P.W.4 as well as that of P.W.3. Panch witnesses have supported all the formalities regarding preparation of panchnama, seizure and drawing of sample, handing over of the goods by BSF officers to Customs authorities and the statements of the accused recorded under Section 67 of the NDPS Act and Section 108 of he Customs Act which were voluntary and genuine in nature, recorded without any threat, coercion, duress or undue influence which were never retracted by them and also got corroboration from other evidence.

27. From the aforesaid facts there is no escape from the conclusion about the guilt of the accused. We are, therefore, of the considered opinion that the learned trial Judge has considered all these aspects properly and correctly held the accused guilty and rightly convicted

and sentenced them.

28. Mr. G. Ramakrishnan, learned advocate for the accused, has referred to reported decisions of the Supreme court as well as various High Courts during the course of his submission which we have noted in earlier paragraphs of this judgment. But, in our view, since the ratio laid down by the Supreme Court as well as other High Courts in those reported decisions rested on the facts of those cases and interpreted the statutory provisions contained under various provisions of the NDPS Act and thus they are not applicable to the facts of the present case and, therefore, we do not deem it expedient to refer to those reported decisions in this judgment to burden the same.

29. On over all view of the matter, we do not find any infirmity in the impugned judgment and order. We are in complete agreement with the finding, ultimate conclusion and resultant order of conviction and sentence recorded by the learned trial judge as, according to us, on the facts and in the circumstances of the present case, no other conclusion is possible except the one reached by the learned trial Judge. We, therefore, confirm the order of conviction and sentence recorded by the learned trial judge.

30. Seen in the above context, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence. Hence the appeal lacks merit and deserves to be dismissed.

31. For the foregoing reasons, the appeal fails and accordingly it is dismissed. The judgment and order which is under challenge in this appeal is hereby confirmed.

(A.M. Kapadia, J.)

(H.H. Mehta, J.)
(karan)